Supreme Court, U.S.
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No. 94-2056

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ROBERT W. KEARNS,

Petitioner,

v.

TOYOTA MOTOR COMPANY, LTD., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF

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23 pp

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PARTIES TO THE PROCEEDING

ROBERT W. KEARNS,

Petitioner,

vs.

CAFC No. 94-1305, -1321

TOYOTA MOTOR COMPANY, LTD.,
NISSAN MOTOR CO., LTD.,
HONDA MOTOR CO., LTD.,
TOYO KOGYO CO., LTD. (MAZDA) and
FUJI HEAVY INDUSTRIES, LTD. (SUBARU)

Respondents.

ROBERT W. KEARNS,

Petitioner,

vs. CAFC No. 94-1307

WOODS MOTORS, INC.,
DAIMLER-BENZ AKTIENGESELLSCHAFT, and
DR. ING. h.c.f. PORSCHE A.G.
SWF-SPECIALFABRIK fur
AUTOZEBEHOR GUSTAV RAU G.m.b.H.,
a corporation of the Federal
Republic of Germany

Respondents.

ROBERT W. KEARNS,

Petitioner,

vs. CAFC No. 94-1308

FRED LAVERY PORSCHE,
WOOD MOTORS, INC.,
VOLKSWAGEN WERKE A.G. WOLFSBURG, and
AUDI NSU AUTO UNION, A.G.

Respondents.

ROBERT W. KEARNS, Petitioner,
v. CAFC No. 94-1306
FERRARI S.p.A.,
AB-VOLVO,
ALFA ROMEO S.p.A.,
AUTOMOBILES-CITROEN, S.A.
BAYERISCHE MOTOREN WERKS, A.G.,
B-L, PLC (British Leland)
FUJI HEAVY INDUSTRIES, LTD.
GROUP LOTUS CARS CO.
HONDA MOTOR CO., LTD.
ISUZU MOTOR CO., LTD.
MITSUBISHI MOTORS CORP.
NISSAN MOTOR CO., LTD.
OFFICIENE ALFIERE MASERATI,
PEUGEOT, S.A.
REGIE NATIONALE RENAULT
ROLLS ROYCE MOTORS, LTD.
SAAB-SCANIA AB,
TOYO KOGYO CO., LTD.(Mazda)
TOYOTA MOTOR CO., LTD
Dealers in the Detroit area:
BARNETT PONTIAC-DATSUN, INC.
BAVARIAN MOTOR VILLAGE, LTD
DALGLIESH CADILLAC-PEUGEOT
JOE DWYER SUBARU VOLVO, INC.
FALVEY OF TROY
GROSSE POINTE AMC-JEEP RENAULT
LA FONTAINE TOYOTA
SEAWAY MOTORS, INC.
SPORTS CAR EXCHANGE, INC.
TAMAROFF BUICK-DMC-HONDA-ROLLS ROYCE, and
WOOD MOTORS, INC. Respondents.

ROBERT W. KEARNS,

Petitioner,

vs. CAFC No. 94-1310

UNITED TECHNOLOGIES CORP. and
UNITED TECHNOLOGIES AUTOMOTIVE, INC.

Respondents.

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(As amended May 24, 1949, c. 139, § 91, 63 Stat. 103.) 8

35 U.S. Code:

§ 154. Contents and term of patent
Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the right to exclude others from making, using, or selling the invention throughout the United States, referring to the specification and drawings for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.
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§ 284 Damages
(a) Upon a finding for the claimant the court shall award the claimant damages
1. adequate to compensate for the infringement,
2. but in no event less than a reasonable royalty for the use made of the invention by the infringer,
3. together with interest and costs as fixed by the court.

(b) When the damages are not found by a jury, the court shall assess them.
(c) In either event the court may increase the damages up to three times the amount found or assessed. 3

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Article 42: Members shall make available to right holders civil judicial procedures concerning the enforce of any intellectual property right cover by this Agreement. ... . The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements. 5

Article 46: In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless that would be contrary to existing constitutional requirements, destroyed. 9

The *REAL* STATEMENT OF THE CASE

Petitioner, Robert W. Kearns, ("Dr. Kearns") is a manufacturing-inventor. He is not a practicing lawyer but is a practicing Registered Professional Engineer. In dealing with patents, professional engineers need to work with professional lawyers.

The Washington Post at C12 for May 20, 1993 reported:

"U.S. Deficit in Trade Grew Sharply in March"

"$10.2 Billion (monthly) Gap Is Worst in Nearly 4 Years"

The Washington Post at B2 for January 6, 1995 reported from a Census Bureau Source, entitled:

LOSING GROUND

"From 1950 to 1978, all U.S. families saw real growth in their income, with the poorest seeing the largest growth. That trend has changed in the period from 1979-1993, when only families in the top (20%) income brackets saw growth."

Know that our great- & grand- & parents accumulated $180 billions in foreign trade credits which our generation began to dissipate in 1979. In March, 1984 those credits passed through zero on a downward slope.

Our country is dying from these foreign trade deficits.

The Supreme Court through enabling legislation by Congress promulgates the Fed. R. Civ. P. Rules to the lower courts. These rules are not yet complete in Dr. Kearns' experience as they do not properly regulate the infringement civil actions of a high demand invention like Dr. Kearns' Windshield Wiper System with Intermittent Operation and its 20 progenies.

At p. 2, line 1, and, in footnote 1, the infringers' Brief in Opposition points with disdain upon "43 named defendants and five separate appeals." Dr. Kearns was refused entry an a supplier of his invented products by the infringers who each control their segment of the U.S. and foreign markets. Dr. Kearns has 21 U.S. patents and many foreign patents in IWWSs. Were Dr. Kearns to export IWWS subassemblies of glass, wipers, motors, electronics, switches, cabling, etc. there would be a positive difference in U.S.

trade equivalent to 150,000 jobs each, on average, paying $20,000 per year. It is in the public interest for that to occur. Instead, Dr. Kearns finds he and the public interest are punished by the District Court in Detroit. That punishment is contrary to the Supreme Court stance:

> "[I]t is not the private use but ... the public interest which is dominant in the patent system[1]." *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U.S. 661, 665.

In 1980 volumes Dr. Kearns finds the law reflects a shift towards recognition that the patent holder's rights and the public interest should be accorded equal weight in deciding patent cases. *Dawson Chem. Co.* v. *Rohm and Haas Co.*, 448 U.S. 176, 221.

The basis of the punishment is that the Judicial Review of infringement of such a high demand products results in only the payment of money by the two adjudged infringers[2] and all the remaining defendants are freed from any penalty by the dismissal of the civil actions without trial. The dismissed defendants countries' citizens also retain the exports, jobs, increased standard of living and increased purchasing power of their currencies which rightfully belong and were earned by a U.S. invention but was turned against the U.S. public interest by the Supreme Court precedents to harm the U.S. public interest by an increased difference of two. What happened to the public interest?

Dr. Kearns' Petition is timely in world events, and, needs to be heard now, because herein he proves this twice damaged U.S. public interest need not occur under our laws as legislated but do

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[1] *Pennock* v. *Dialogue*, 2 Pet. 1; *Kendall* v. *Winsor*, 21 How. 322, 329; *Adams* v. *Burke*, 17 Wall. 453; *Motion-Picture Co.* v. *Universal Film Co.* 243 U.S. pp. 510-511; *Morton Salt Co.* v. *G.S. Suppiger Co.*, 314 U.S. 488, 493; *United States* v. *Masonite Corp.*, 316 U.S. 265, 278 ... The patent is a privilege. But it is a privilege which is conditioned by a public purpose ...".

[2] The jury found six out of six of Dr. Kearns' IWWS patents were infringed in *Kearns* v. *Ford*. A different jury found that four out of four, of the six Dr. Kearns' IWWS patents that were found valid in *Ford*, were infringed by *Chrysler Corporation* and by *American Motors Corporation*.

require a change in Judicial practices by the intervention of the Supreme Court. To begin —

The 'routine life' of a U.S. patent is 17 years. If the trials are held in series, the Judicial precedents say the patents expired, at least for some defendants. If the trials are held in parallel, the inventor needs millions of dollars for lawyers and the coordination between multiple law firms and the trial litigator basically still 'drowns' in paper work. (The defendants' attorneys know that fact, and they know how to pour on the paper work!)

Now, we turn to the patent law, 35 U.S. Code (See text p. xi) **§ 281. Remedy for infringement of patent**. We see the civil action remedy is only to the patentee. The public interest can only be attained through the remedy to the patentee. There are but two remedies: **§ 283 Equitable Relief**[3], and, **§ 284 Damages** (See texts p. xi.) Damages is money to the patentee. His/her income taxes do not dent the twice incurred U.S. export economic penalty. The solution to the problem requires that we read the U.S. Const. Art. I, § 8, cl 8 (See text p. ix) 35 U.S.C. § 154 Contents and term of patent (See text p. x) and Congressional Hearings (See titles p. ix.)

Clause 8 states the inventor's exclusive right is to be secured for limited times (plural). A **term** does not state a starting time or ending time but rather is a quantity of time. The **term** of time in **§ 154** is 17 years. **§ 154** does not state when the term begins. Of great importance is the fact that the phrase, "from the date of this grant" is not present in **§ 154**! The legal foundation for limiting the inventor to a single time period of 17 years 'routine life' starting with the publication of the inventor's discoveries simply is not in § 154!

Let's ask ourselves some questions:

How can an exclusive right be secured to the inventor the day his discoveries are published if others are already infringing them

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[3] Grounds of equitable relief may arise other than by way of injunction. *Root* v. *Lake Shore, etc. R. Co.*, Ill. 1882, 105 U.S. 189, 26 L.Ed.975.

on that day[4]? It can't. (But it happened to Dr. Kearns in his remedy civil actions under the present Judicial precedents.)

How can an exclusive right be secured to the inventor if the District Court denies his Motion for Preliminary Injunction on the basis that the case will be over before the 'routine' expiration of his patent and the Court does not even bring the case to trial in 18 years, let alone, complete the trial within the expiration of the 'routine life' of the patent? It can't. (But it happened to Dr. Kearns in his remedy civil actions under the present Judicial precedents.)

How can an unsuccessful challenge to a patent's validity 'tick away' the patent's life? It can't, when the infringer continues to infringe during the unsuccessful validity trial. (But it happened to Dr. Kearns in his remedy civil actions under the present Judicial precedents.)

When these happenings occur to Dr. Kearns, the patentee, they happen to the public interest, as well. The plural 'limited times' through § 283 bring consistency and the public interest back into the remedy. Moreover, § 284 Damages alone are nothing more than a compulsory license issued through the Courts to the infringer from the patentee. The Congress rejected a compulsory licensing section in 35 U.S. Code on two occasions that Dr. Kearns is aware of[5].

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[4] "But if the products of the experiment are sold, or used for the convenience of the experimentor, or if the experiments are conducted with a view to the adaptation of the invention to the experimentor's business, the acts of making or of use are violations of the rights of the inventor and infringements of his patent." Section 898 of *The Law of Patents for Useful Inventions*, by W. Robinson (1890) cited with approval in *Roche Products* v. *Bolar Pharmaceutical Co.*, 733 F.2d 858 (C.A. Fed. Cir. 1984).

In Chisum, REMEDIES FOR PATENT INFRINGEMENT, page 397:

The possibility of post-expiration equitable relief was raised but not resolved in *Roche Prods., Inc.* v *Bolar Pharmaceutical Co., supra.*

[5] *McFarlane Compulsory Licensing Bill*; Hearing on H.R. 9259 before the O'Malley Committee, 75th Cong., 3rd Sess. (1938)

RECOVERY IN PATENT INFRINGEMENT SUITS, Hearing before the

Earlier, Dr. Kearns referred to this Petition as timely. Dr. Kearns filed about 18 June 1993 in his civil actions: MEMORANDUM IN SUPPORT OF PLAINTIFF KEARNS' MOTION TO YET ALLOW EVIDENCE TO GRANT DR. KEARNS EQUITABLE RELIEF TO BRING THEM INTO ACCORDANCE WITH THE USA'S POSITION UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE IN THE URUGUAY ROUND.

Promptly, the District Judge ruled the Motion, "frivolous[6]".

Under the GATT treaty[7],which Dr. Kearns had closely studied before and after June '93,— infringement is to be deterred. Under the GATT treaty, the Constitutions of the member countries are to be respected and honored: Two examples are given, GATT Articles 42 & 46. (See, p. xii.) The GATT treaty patent law became U.S. law on 8 June 1995. It is imperative to the U.S. export trade position, that the Supreme Court state the meaning of 'limited times' now. To wait, is to disadvantage the public

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U.S. Congress, House Committee on Patents. House of Representatives, 79th Congress, 2d sess., on H.R. 5231, A Bill to Amend Revised Statutes, 4921 (U.S.C. Title 35, Patents, Sec. 70), Providing That Damages be Ascertained on the Basis of Compensation for Infringement, as in Actions for Infringement in the U.S. Court of Claims. (Subsequently amended, reintroduced, and reported as H.R.5311) January 29, 1946

[6] From the transcript of the proceedings in *Kearns* v. *Ferrari et al.* and *Kearns* v. *General Motors Corp.* of Monday, 21 June, 1993 before: Dr. Kearns, (Kearns *Engineers*); Mr. Allegretti (*GM & United*); Mr. Hunter (*Nissan*); Mr. Lyon (*Honda*); Mr. Roberts (*Fuji*); Mr. Badenoch (*Ferrari, et al.*); Special Master Barker:

p. 39, starting line 8:

THE COURT: The two motions he recently filed, which I would call the Uruguay Round (GATT) motions, are paradigms of what I'm talking about. They are so extraordinary frivolous in the Court's view, [GATT became law on 8 June 1995] so far out of the mainstream of anything that can be expected in litigation of this kind as to support the Court's observation of a moment ago.

[7] URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS, IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION, AND REQUIRED SUPPORTING STATEMENTS, House Document 103-316, Vol. 1, 103d Congress, 2d Session 27 September 1994.

interest in the patent law, by the 'limited times' continuing to be interpreted by the Supreme Court as a single period of time.

Dr. Kearns civil actions have been waiting for trial since 1978[8] — that is, they are waiting in their 18th year for trial — longer than the 'routine life' of U.S. patents. The public interest has been excluded under the present Judicial precedents and would be repaired by this Petition to be heard being granted.

* * *

Reply to United Technologies opposition
p. 5, beginning line 12; and,
at p. 7, beginning line 9; (See text p. vi.)

From the transcript of the proceedings in *Kearns* v. *United Technologies, et al.* on Monday, March 28, 1994:

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[8] *Kearns* v. *SWF-SPECIALFABRIK fur AUTOZEBEHOR GUSTAV RAU G.m.b.H., a corporation of the Federal Republic of Germany*, Civil No. 79-74451 has not come to trial in 17 years;

SWF supplies infringing IWWS to Daimler-Benz and Porsche;

Kearns v. *Wood Motors, Inc.*, *Daimler-Benz Aktiengesellschaft* and *Dr. Ing. h.c.f. Porsche, A.G.* Civil No. 78-70642, has not come to trial in 18 years;

and, the one Judge has SWF, Daimler-Benz and Porsche documents which SWF, Daimler-Benz and Porsche's attorneys wrote which identify which of Kearns' patents and claims they know they are infringing and which they know they are not infringing;

Kearns v. *Fred Lavery Porsche, Wood Motors, Inc.*, *Wolkswagen Werke A.G. Wolfsburg*, and *Audi NSU Auto Union, A.G.*, Civil No. 82-70749 has not come to trial in 14 years;

Kearns v. *Ferrari (plus)* Civil No. 85-70459, has not come to trial in 11 years;

Kearns v. *General Motors Corp.*, Civil No. 85-70461, was abruptly dismissed on July 20, 1993. *See*, Congressman Knollenberg's Eric Feiler's account of the dismissal [A]. (Know: Mr. Kearns is not Dr. Kearns);

Kearns v. *United States of America*, Civil No. 436-84C in the U.S. Court of Federal Claims, Dr. Kearns' Complaint of District Court not starting trial before patent 'routine life' expired was denied without remedy through all appeals including to the Supreme Court.

p. 9, starting line 6:

THE COURT: Because I'm not ruling on the motions to dismiss or for summary judgment. Those are not in a proper posture for ruling. So the basis for (United Technologies) dismissal would have to be a finding, not based on the record in this case (as the case has not started, yet), but based on the record in the Ferrari case.

MR. McDERMOTT: Yes, your Honor.

THE COURT: And the manner in which he managed, responded in the Ferrari case.

MR. McDERMOTT: I am familiar with that record[9].

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[9] The record shows in PLAINTIFF ROBERT W. KEARNS' MOTION FOR RECONSIDERATION of about 20 February 1994 [A 12 to A 21] that there was but one discovery request for Dr. Kearns to produce:

Defendants' Request to Produce No. 1 to Plaintiff is given in Exhibit A:
Request No. 1

All documents produced by plaintiff in prior litigations involving any of the patents in suit.

The ground rules were defined in Exhibit B dated 5 May '93. Relevant portions are:

After copies are made ... Kearns will then "pull" from those copies and keep separate from other documents any materials which he wishes to withhold from production because of claims of attorney-client privilege or attorney work product **or because they are outside the scope of the Request for Production**. (Emphasis added.)

Dr. Kearns will release ... documents ... he does not claim privilege ... and will serve upon Defendants ... a list of all documents withheld ....

Simply stated the *Ferrari* case dismissal by the District Court included the reason that Dr. Kearns refused to release a Ford Engineering Drawing given to Dr. Kearns by Ford in the prior litigation, *Kearns* v. *Ford Motor Company*. Dr. Kearns filed in the District Court record that the request was outside the scope of the Request for Production! Which it obviously is, as the request concerns documents Dr. Kearns produced to others - not documents Dr. Kearns received from others.

THE COURT: That this case is **not identical**, but its substantially **similar**, it's an infringement case in which he alleges infringement, and that there would be a claim that the patents were invalid, and **it's a different set of patents**, you know, **and different circuits**. But in any event, it's still a patent holder who persists in, insists on representing himself[10] under circumstances where the Court in an analogous case has found that he lacks the ability to do so.

MR. McDERMOTT: Yes, your Honor.

THE COURT: The case is dismissed on those grounds, ... (**Emphasis** added.)

The record itself thus refutes the assertion the Court did not dismiss *Kearns* v. *United Technologies, et al.* on the basis of United's summary judgments as United Technologies alleged.

* * *

Reply to United Technologies opposition
p. 2, line 1: (See text p. vi.)

From the transcript of the proceedings in *Kearns* v. *United Technologies, et al.* on Monday, March 28, 1994 starting p. 6, line 10:

THE COURT: Now, the third motion is a Motion

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[10] Does Const. Art. I, § 8 cl 8 promote the progress of science and the useful arts by denying (before any civil action activity has occurred) to the inventor the statutes available to other plaintiffs? Can a person violate a law in a case without doing anything in said case? Is the Judge a partisan in a high place?

See, 28 U.S. Code **§ 1654 Appearance personally or by counsel**

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

(As amended May 24, 1949, c. 139, § 91, 63 Stat. 103.)

to Dismiss by both (United) parties, which **piggybacks the decision in Ferrari**, and there it would be that Dr. Kearns is incapable of managing pre-trial matters and Kearns incapable of managing a trial.

MR. McDERMOTT: Yes, your Honor.

THE COURT: Have I got it right?

MR. McDERMOTT: Yes, you do. **We view ourselves as just procedurally identical to the Ferrari case.** ... .

(**Emphasis** added.)

Thus, the record transcript above shows that "The circumstances of the bringing and dismissing of the one is distinct and different from those of the others." is refuted first, by the Judge's statements that "United Technologies "*piggybacks* the decision in Ferrari;" and, second, by United Technologies attorney, Mr. McDermott's statement that, "We view ourselves as just *procedurally identical* to the Ferrari case."

* * *

Reply to United Technologies opposition
p. 3, line 8: (See text p. vi.)

First, when a person sues an automobile assembler, they run into conflicts galore. For example, General Motors does business with 600 law firms each year.

Second, the IWWS subject matter may have been the same, but the civil action remedies were not. Arnold, White & Durkee Corporation ("AW&DC") was to represent Dr. Kearns' manufacturing remedy, not AW&DC remedy of money for themselves — abandoning Dr. Kearns' pre-trial order claim of § 283 Equitable Relief. Thus, Dr. Kearns discharged AW&DC an hour before they intended to sign said pre-trial order. Nor did Reed Smith Shaw & McClay stay in the case to seek § 283 Equitable Relief either.

Both firms abandoned the public interest. Dr. Kearns was right in rejecting those not of "professional stature." It was Bob Kearns who persevered and served as Dr. Kearns' trial counsel in the damage phase of *Kearns* v. *Chrysler et al.*[11]

Reply to United Technologies opposition
p. 8, line 22:
"II. Kearns has failed to identify a question subject to review under Supreme Court Rule 10.
p. 8, line 5: "Kearns has cited no appeals court precedent which conflict with the court of appeals' dismissal ..."

In reply, Dr. Kearns cites as he did in his Petition for Writ of Certiorari, the precedent in the Ninth Circuit at n. 17 of A 53 of *Miller* v. *Maxwell's Int'l., Inc.*, 991 F.2d 583, 585 (9th Cir.1993) relying on a pre-*Osterneck* [*Osterneck* v. *Ernst & Whinney*, 489 U.S. 169, 179 (1989)] case that held the other way.

CONCLUSION

Grant this Petition, please, for a writ of certiorari to Dr. Kearns and address the problems you can control to aid the patent law and our country's foreign trade, as this is a deserving Petition paid for by Dr. Kearns at high cost.

Respectfully submitted,

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[11] See United Technologies' Opposition, footnote 2.